

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition                        | : |                |
| of   | : |                |
| <b>AMIE GROSS</b>                                    | : |                |
| for Redetermination of a Deficiency or for Refund of | : | DETERMINATION  |
| New York State and New York City Personal Income     | : | DTA NO. 820498 |
| Taxes under Article 22 of the Tax Law and the New    | : |                |
| York City Administrative Code for the Year 2002.     | : |                |

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Petitioner, Amie Gross, 400 Chambers Street, Apt. 22-G, New York, New York 10282, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2002.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Andrew S. Haber, Esq., of counsel), brought a motion dated September 30, 2005,<sup>1</sup> seeking summary determination in this matter pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) on the ground that petitioner failed to file a timely petition contesting the statutory notice at issue. In response to petitioner's request dated October 28, 2005, petitioner was granted an extension of

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<sup>1</sup> A Notice of Intent to Dismiss Petition dated May 27, 2005 issued by the Division of Tax Appeals was rescinded upon receipt of a letter dated June 14, 2005 from the Division of Taxation's Office of Counsel which advised that the proof of mailing for the Conciliation Order dated December 24, 2004 was "insufficient to prove the actual date of mailing." The relevant certified mail record did not bear any entry made by the United States Postal Service to indicate the actual number of pieces of mail received at the post office thereby failing to establish that the Conciliation Order addressed to petitioner was actually mailed to her on December 24, 2004. Such entry by the Postal Service has been deemed necessary to prove mailing in prior decisions of the Tax Appeals Tribunal such as *Matter of Cal-Al Burrito* (July 30, 1998). The motion under review was subsequently brought by the Division of Taxation after it was able to obtain proof of petitioner's *actual receipt* of the Conciliation Order dated December 24, 2004 as discussed in this determination.

time to submit her response<sup>2</sup> until November 30, 2005, which date commenced the 90-day period for issuance of this determination. After due consideration of the affidavits and documents presented by the Division and the pleadings in this matter, Frank W. Barrie, Administrative Law Judge, renders the following determination.

### ***ISSUE***

Whether petitioner failed to file a timely petition following the issuance of a Conciliation Order so that summary determination in favor of the Division of Taxation is properly granted as a matter of law.

### ***FINDINGS OF FACT***

1. Petitioner, Amie Gross, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) seeking a review of a Notice and Demand<sup>3</sup> for Payment of Tax Due dated July 11, 2003, which assessed New York State and New York City personal income tax of \$8,008.00 plus penalty and interest for the year 2002.

2. Petitioner opted to have the matter of her request decided by correspondence in lieu of appearing at a conciliation conference. After considering the evidence presented by the parties, BCMS issued a conciliation order by Conciliation Conferee Thomas F. O’Donnell dated December 24, 2004 which recomputed the statutory notice by sustaining the tax plus interest but cancelling penalty.

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<sup>2</sup> No response was ever received from petitioner.

<sup>3</sup> Petitioner, allegedly as a result of financial hardships, did not remit taxes with her tax return for 2002, and the Division issued a Notice and Demand for taxes due dated July 11, 2003. Pursuant to Tax Law § 173-a, effective August 20, 2004, and applicable to notices issued on or after December 1, 2004, the Division of Tax Appeals no longer has jurisdiction to review a notice and demand. The Notice and Demand at issue was issued approximately one year prior to the effective date of this law which narrowed the jurisdiction of the Division of Tax Appeals and in effect overruled the court decision in *Matter of Meyers v. Tax Appeals Tribunal* (201 AD2d 185, 615 NYS2d 90, *lv denied* 84 NY2d 810, 621 NYS2d 519).

3. The Division submitted the affidavit dated September 8, 2005 of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Forms 3811-A for mailing. This form is used by the mailer to request return receipts after mailing. Attached to Ms. Corina's affidavit is a copy of the Form 3811-A which was prepared in order to request a return receipt after mailing for mail delivered to petitioner. This form requested information regarding an article of mail bearing item number 7104 1002 9730 0501 4084 and addressed to petitioner at 400 Chamber Street, #22F, New York, New York 10282-1017 on a mailing date of December 24, 2004. The Division's relevant certified mail record shows that this article of mail bearing item number 7104 1002 9730 0501 4084 was the Conciliation Order dated December 24, 2004.<sup>4</sup> Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request, i.e., a letter on USPS letterhead dated July 22, 2005. This letter states in part: "The delivery record shows that this item was delivered on 01/03/2005 at 10:24 AM in New York, NY 10282." The letter also contains a scanned image of the recipient information, which contains a recipient's signature and a recipient's address of "400 Chambers Street." The recipient's signature is that of petitioner, Amie Gross. Besides the fact that the name, Amie Gross, is printed below the signature, the signature on this form matches petitioner's signature on the petition dated April 26, 2005.

4. By an envelope postmarked April 27, 2005, which was received by the Division of Tax Appeals on April 29, 2005, petitioner filed a petition dated April 26, 2005 for a hearing before the Division of Tax Appeals.

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<sup>4</sup> This finding is based upon the detailed explanation of the mailing procedures used to mail conciliation orders contained in the affidavit dated September 8, 2005 of Bruce Peltier, the Mail and Supply Supervisor, who was fully familiar with the operations and procedures of the Division's Mail Processing Center. He also reviewed the relevant certified mail record, which is part of the record, to establish such fact.

### **CONCLUSIONS OF LAW**

A. Pursuant to Tax Law § 170(3-a)(e), a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Here, as noted in Footnote “1”, the Division conceded that it did not have adequate proof to establish the mailing of the conciliation order to the taxpayer.

B. Nonetheless, although the Division could not prove the date of mailing of the conciliation order, the information provided to the Division by the Postal Service establishes the conciliation order was received by petitioner on January 3, 2005. As long as a statutory notice or conciliation order is received by the taxpayer in sufficient time to file a petition, the notice is valid (*see, Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, 229, *lv denied* 79 NY2d 759, 584 NYS2d 447), and the 90-day period to petition begins to run from the date of receipt (*see, Matter of Greene Valley Liquors*, Tax Appeals Tribunal, November 25, 1992).

C. Petitioner had 90 days from her receipt on January 3, 2005 of the conciliation order to file a petition in response to the conciliation order. The 90<sup>th</sup> day, counting from January 3, 2005, is April 3, 2005. Since April 3, 2005 was a Sunday, petitioner had until April 4, 2005 to file her petition (*see*, Tax Law § 691[c]; General Construction Law § 20). As noted in Finding of Fact “4”, the petition was not received by the Division of Tax Appeals until April 29, 2005 in an envelope dated April 27, 2005. The petition was thus filed approximately three weeks late, and consequently, the Division of Tax Appeals has no jurisdiction over this matter (*see, Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal May 15, 2003). Even one day late precludes a

taxpayer from having a petition heard since deadlines for filing petitions are strictly enforced (*see, Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996). Even personal tragedy or ill health do not provide a basis to excuse the late filing of a petition (*see, Matter of Perillo*, Tax Appeals Tribunal, August 2, 1990; *Matter of Rathgaber*, Tax Appeals Tribunal, April 5, 1990).

D. A motion for summary determination may be granted,

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

As noted in Conclusion of Law “C”, petitioner failed to file a timely petition in response to the Conciliation Order dated December 24, 2004. Therefore, the Division’s motion for summary determination, on the basis that the Division of Tax Appeals has no jurisdiction over this matter because petitioner failed to file a timely petition, is properly granted.

E. Furthermore, a review of the petition shows that petitioner does not claim that she miscalculated the tax reported on her return or made any other payments. She seeks relief simply on the basis of her financial hardship. The Division of Tax Appeals lacks authority to consider if the Commissioner should grant a taxpayer an offer in compromise (*Matter of Williams*, Tax Appeals Tribunal, September 1, 1994). Consequently, even if the petition had been timely filed, the Division of Tax Appeals would not have the power to grant the relief sought.

F. Finally, it is observed that penalty has already been cancelled by the Conciliation Order dated December 24, 2004, and interest on unpaid personal income tax is mandatory and

does not raise an issue of fact for the Division of Tax Appeals to consider (*see*, Tax Law § 684; *Matter of Welco Ad Corp.*, Tax Appeals Tribunal, November 23, 1994).

G. The Division of Taxation's motion for summary determination is granted and the petition dated April 26, 2005 of Amie Gross is dismissed.

DATED: Troy, New York  
January 19, 2006

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE